United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

~~74-4577~~ 76-7343

ORIGINAL

To be argued by
JOSEPH P. NAPOLI

United States Court of Appeals
FOR THE SECOND CIRCUIT

CLARENCE O. GOKAY, JR., an infant by his mother DOROTHY GOKAY, individually,

Plaintiff-Appellee,

against

MARC ANTHONY'S INC. d/b/a MARC ANTONIO'S RESTAURANT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

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Preliminary Statement

This is an action on behalf of the infant plaintiff herein whose 2nd, 3rd, 4th and 5th fingers of his left hand were traumatically amputated while working at defendant Marc Antonio's Restaurant.

Defendant herein is appealing from a judgment entered in the office of the Clerk of the United States District Court, Southern District of New York on *June 11, 1976.* The Notice of Appeal herein was filed on *July 14, 1976* with the United States District Court, Southern District of New York, by Hon. William C. Connor having granted

defendant's motion, dated *August 25, 1976*, to file a Notice of Appeal nunc pro tunc by Order dated *August 27, 1976*. The granting of said motion and late filing of the Notice of Appeal are the subject of a separate appeal.

The Facts

The Accident

On June 17, 1973, at approxmately 11:00 or 11:30 A.M., the infant plaintiff Chuckie Gokay, 12 years old at the time of the accident, accompanied his father and his brother Tommy Gokay to the defendant's restaurant (74a, 99a).

Mr. Gokay ". . . had to kick on the door so I could get Mr. Marcantonio up so I could get in the place . . .". Mr. Marcantonio lived in the building upstairs and came down to open the door and saw Mr. Gokay, Chuckie and Tommy (65a, 179a). Chuckie asked Mr. Marcantonio if he could mow the lawn and Mr. Marcantonio said "Yes". He then went into the kitchen and asked his father if he needed anything done and he was told to clean out the refrigerator (67a). He had done this prior to the accident and was in the process of cleaning out the refrigerator, and he went to the bathroom and then was walking in the kitchen past the Hobart grinding machine, which was being operated by his brother to grind tomatoes, to get a soda (27a, 182a-181a).

"Then I walked past the machine, I slipped. I tried to grab for the machine and my hand went into the hole in top of the machine" (181a).

Defendant Contends Chucky Not Employee

Although the defendant herein argues that the Workmen's Compensation Law should apply, the owner of the restaurant, Anthony Dimarcantonio, testified that he never saw Chucky Gokay in and around the restaurant and that "he was not there as an *employee*" (147a), and he con-

tended throughout the litigation that Chucky was not an employee there (emphasis supplied).

Pennsylvania Child Labor Law

Defendant in its brief fails to cite the Pennsylvania Child Labor Law which provides that:

> "Title 43—Labor
>
> § 42. Employment of minors under 16
>
> No minor under sixteen years of age shall be employed or permitted to work in, about, or in connection with, any establishment or in any occupation except that a male minor between the ages of twelve and fourteen years may be employed as a caddy subject to the limitation that he carry not more than one golf bag at a time and for not more than eighteen holes of golf in any one day and except that a minor between the ages of fourteen and sixteen years may be employed as hereinafter provided in such work as will not interfere with school attendance; Provided, however, That nothing contained in this section shall be construed as superseding or modifying any provisions contained in section seven of the act to which this is an amendment."

And § 44 thereof, which provides, in part, that:

> "No minor under eighteen years of age shall be employed or permitted to work in, about, or in connection with any establishment where alcoholic liquors are distilled, rectified, compounded, brewed, manufactured, bottled, sold or dispensed."

This theory of liability and the applicability of the Child Labor Law was contained in Plaintiff's Trial Memorandum of Law served on the defendant on or about February 4, 1976, three and one-half (3½) months prior to the beginning of the trial on May 18, 1976 (2a).

Thus, the statement in appellant's brief that: "Defendant was never aware of the entirely new theory of plain-

tiff's case until the trial had commenced" (see page 6 of appellant's brief) is totally erroneous.

In addition, as requested by the Court, also prior to trial the infant plaintiff in his requests to charge—no written requests to charge were submitted by the defendant—requested that the Court charge the aforementioned Child Labor Law, copies of which were also supplied to the defendant prior to May 18, 1976 (2a).

Despite defendant's knowledge that plaintiff was relying on the Child Labor Law prior to trial, defendant waited to the end of the entire case to move to amend its Answer. Defendant, who had the burden of proof on this issue, never proved that it had secured compensation insurance covering the plaintiff. *Flatau* v. *Fairchild Camera & Instrument Vorp.*, 40 AD 2d 990, 338 NYS 2d 663 (2nd Dept. 1972)*

The Court's Charge

Defendant, on pages 8 and 9 of its brief, cites all the applicable Pennsylvania statutes including the definition of an employee, which states that:

> "Title 77, § 22—Workmen's Compensation Act:
>
> § 22. 'Employe' defined—
>
> The term 'employe,' as used in this act is declared to be synonymous with servant, and includes—
>
> All natural persons, who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the em-

* At the request of the Trial Court, a Workmen's Compensation claim was filed in Pennsylvania. The Court is requested to take judicial notice of the fact that the employer Marc Anthony's Inc. d/b/a Marc Antonio's Restaurant is defending said claim upon the basis that the infant plaintiff was *not an employee* (see Clarence O. Gokay Jr., Claimant against Marc Anthony Inc. d/b/a Marc Antonio's Restaurant, Referee No. 4212 Commonwealth of Pennsylvania, Department of Labor and Industry, Bureau of Occupational Injury and Disease Compensation).

> ployer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer."

This section is most important, in that, it was an integral part of the Trial Court's charge to the jury to which part the defendant failed to take exception.

In charging the jury, the Trial Court indicated that:

> "In this case the plaintiffs have alleged that the infant plaintiff, Clarence Gokay, Jr., was injured as a proximate result of working in or about the premises of Marc Antonio's Ristorante on June 17, 1973. There are several issues of fact that you will have to decide.
>
> "The first issue of fact that you will have to decide is whether or not the plaintiff was an employee of Marc Antonio's Ristorante. When I refer to the 'plaintiff' I am referring to the infant plaintiff, Clarence Gokay, Jr. The reason why you have to determine that is that under the Pennsylvania workmen's compensation law, which is applicable here, the plaintiff cannot recover for an injury sustained in the course of his employment. His sole remedy is under the workmen's compensation law, and he would have to proceed by a claim under that law instead of by bringing a suit in this Court. That law is applicable if the plaintiff was an employee and if the injury was sustained in the course of his employment."

With respect to whether the infant plaintiff was an employee, the jury was instructed to:

> "First you will have to determine whether or not Clarence Gokay, Jr., was an employee of Marc Antonio's Ristorante on June 17, 1973. An employee is a person who performs services for another in exchange for a valuable consideration, exclusive of

persons whose employment is casual in character and not in the regular course of an employer's business. Let's break that down and define some of the words in that definition.

"I referred to services performed for another. In the context of this case, a service is the performance of labor for the benefit of another.

"I also used the expression 'valuable consideration.' Valuable consideration is not limited to money. It may refer to the payment of a wage or a gratuity or stipend, but it doesn't necessarily do so. It may include any benefit, however, small, which is derived by the plaintiff himself or conferred upon a third party whom plaintiff wishes to confer a benefit upon. However, the valuable consideration must be conferred in exchange for the plaintiff's performance of services.

"I said that 'an employee' excluded persons whose employment is casual in character and not in the regular course of business. Note the word 'and' that I used. In order to be entitled to this exception, a plaintiff must establish both that his employment was casual and that it was not in the regular course of the employer's business. An employment is casual only if it is infrequent and irregular. An employment is not casual if it relates only to a single or special job that is not of an emergency or incidental nature, but rather represents a planned project and the tenure of service necessary to complete the project is of fairly long duration.

"However, if a person is employed only occasionally, at long and irregular intervals for limited and temporary purposes, the hiring in each instance being a matter of special engagement, such employment is casual. The term 'casual' is often regarded as the equivalent of such terms as 'occasional,' 'incidental,' 'temporary', 'haphazard,' and 'unplanned'.

"Now let's look at the expression 'regular course of business.' This expression refers to the habitual or regular occupation by which the employer earns his livelihood or obtains some other gain. The term refers to normal operations that regularly constitute the employer's business. It excludes incidental or occasional remodeling or repair of the employer's premises.

"In this case, the exception will apply only if you find both that the employment was casual and you further find that the employment was not in the regular course of the employer's business. You will have to determine whether cleaning the refrigerator, for example, is in the regular course of the employer's business, if you find that is what Clarence Gokay, Jr. was in fact doing at the time or at about the time of the accident. If you find that he was working in the regular course of the employer's business in doing whatever he was doing at or about the time of the accident, then you cannot find that he is thus disentitled to compensation and you can disregard that part of the definition and consider only whether he is an employee in the sense of performing services for another in exchange for a valuable consideration.

"If you find that he was working in the ordinary course of the employer's business and you further find that he was performing services for another in exchange for a valuable consideration, then, of course, you will find that he was an employee and that he cannot recover because his exclusive remedy would be under the workmen's compensation laws.

"If, on the other hand, you find either that he was not performing services for another in exchange for a valuable consideration or that his work was both casual and that it was not in the course of the employer's business, then you will find that he is not barred from recovery for that reason, and then you will proceed to the next issue in the case."

The defendant only objected to charging the Child Labor Law, Title 43 Labor §§ 41 and 44, and did not except to this part of the charge (257, 322a).

The Trial Court then charged the Child Labor Law and told the jury that:

> "I am going to reiterate those three things that you must find to find the defendant liable under the child labor laws:
>
> "First: you must find that the plaintiff performed work in, about or in connection with the defendant's business.
>
> "Second: you must find that the defendant, Mr. DiMarcantonio, was aware that the plaintiff was working there and permitted it.
>
> "Third: you must find that the work which the plaintiff was doing at the defendant's establishment was a proximate cause of the plaintiff's injury." (310a).

In addition, in submitting the case to the jury, the Trial Court stated that:

> "In order to help you in your deliberations, I have prepared a list of three questions. These will help remind you of the things that I said during my charge. It is entitled 'Questions to be Answered by the Jury.'
>
> "One. Was Clarence Gokay, Jr., an employee of Marc Antonio's Ristorante on June 17, 1973? There is a blank and below that in parenthesis, 'Yes or No.' So the jury will try to arrive at a unanimous 'Yes' or 'No' answer, and if they can, they will place that answer in the blank. Following that question there is this statement in parentheses:
>
> " 'If the answer to Question 1 is 'Yes,' no further questions need be answered.'
>
> "You may recall that I told you that if the jury finds that Clarence Gokay, Jr. was an employee of the

restaurant on the date in question, his exclusive remedy would be by a claim under the Pennsylvania workmen's compensation laws and he could not bring a further action in this court. So if you answer that question 'Yes', you need go no further because that will be the end of the case.

"Question 2 reads:

"Was Clarence Gokay, Jr. injured as a proximate result of working in or about Marc Antonio's Ristorante at the time of the accident on June 17, 1973?" There is a blank for you to write in 'yes' or 'no.' In order to answer that question 'Yes,' you have to find two things:

"One is, you have to find that Clarence Gokay, Jr. was working in or about Marc Antonio's Ristorante at the time of the accident; and, second, you must find that he was injured as a proximate result of such work. Only if you find both that he was working in or about the restaurant at the time in question and that he was injured as a proximate result of such work, can you answer that question 'Yes.' Below that question there is this statement in parentheses:

" 'If the answer to Question 2 is 'No,' no further question need be answered.' The reason, of course, is that if you find that he either wasn't working in or about the restaurant or that he wasn't injured as a proximate result, there can be no recovery on the basis of the child labor law. However, if you answer Question 2 'Yes,' then you will answer Question 3, . . .' " (358a, 320a).

POINT I

The jury properly determined as a question of fact that the infant plaintiff was not an employee as defined in the Workmen's Compensation Law but was working and injured in defendant's restaurat in violation of the Child Labor Law.

It is undisputed that it was the defendant's contention throughout the trial and the testimony of its owner that the infant plaintiff was not an employee of the defendant restaurant at the time he lost the 2nd, 3rd, 4th and 5th fingers of his left hand when he slipped and fell grabbing on to the Hobart grinding machine in the kitchen of defendant's restaurant.

Based upon the defendant's request and defendant's insistence upon the applicability of the Workmen's Compensation Law, the Court submitted to the jury, as its first special question, the issue of whether Clarence Gokay, Jr. was an employee of M re Antonio's Ristorante on June 17, 1973.

Judge Conner included in this charge to the jury without exception, the definition of employee as contained in Title 77, Sec. 22 of the Pennsylvania Workmen's Compensation Law which provides that:

> "Title 77, § 22. 'Employee' defined
>
> The term 'employe,' as used in this act is declared to be synonymous with servant, and includes—
>
> All natural persons, who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other

premises, not under the control or management of the employer."

The Trial Court told the jury, at the request of the defendant, since they were relying on the defense of Workmen's Compensation, and without exception by the defendant, that they first had to decide "whether or not the plaintiff was an employee of Marc Antonio's Ristorante" (305a). In giving the jury the definition of employee, as contained in the Pennsylvania Workmen's Compensation Law, Judge Conner, without exception by the defendant, reviewed and explained the definition of employee (305a-308a).

Thus, the first question to be answered by the jury, to which there was no objection by the defendant (296a), was "Was Clarence Gokay, Jr. an employee of Marc Antonio's Ristorante on June 17, 1973?" (318a). The jury's answer was "No" (337a). Thus, the issue of whether the infant plaintiff was an employee was decided in favor of the infant plaintiff.

This finding of fact by the jury was important because the Child Labor Law of Pennsylvania, Title 43, § 42, entitled "Employment of minors under 16" provides in part that:

> "No minor under sixteen years of age shall be employed *or permitted to work*. . . ."

and § 44 provides in part that:

> "No minor under eighteen years of age shall be employed or *permitted to work*. . . ."

There can, therefore, be a violation of the Pennsylvania Child Labor Law if the infant plaintiff was not an employee but "permitted to work."

It is undisputed and the Trial Court so charged that defendant would be absolutely liable to the plaintiff, with

contributory negligence not being a defense, for violation of the Pennsylvania Child Labor Law (356-358). See *Stehle* v. *Jaeger,* 220 Pa. 617, 69 A. 1116 ( ); and *Mitchell* v. *Mione Mfg. Co.,* 112 Pa. Super. 394, 171 A. 114 (1934).

The second question the jury was requested to answer was "Was Clarence Gokay, Jr. injured as a proximate result of working in or about Marc Antonio's Ristorante, with the knowledge and acquiescence of Mr. D. Marcantonio, at the time of the accident on June 17, 1973?" (325a)

In response to the Trial Court's question and within the context of the charge, the jury found that the infant plaintiff was working in or about defendant's restaurant, in violation of the Pennsylvania Child Labor Law (337-338a).

The finding by the jury that Chuckie Gokay *was not an employee* of defendant's restaurant is important, since § 672 of Workmen's Compensation Law refers to "the *employee*" and the cases cited by defendant refer to ". . . an illegally *employed* minor . . ." (emphasis supplied). The Court below recognized this distinction and was aware of § 421 of the Workmen's Compensation Law which also refers to ". . . a minor . . . *employed* or is permitted to be *employed* . . ." (emphasis supplied).

The cases cited by defendant in Point I of its brief for the proposition that the applicable Pennsylvania case law mandates dismissal of this action are distinguishable on their facts from the case at bar and did not discuss the issue raised on this appeal, i.e., that the jury properly determined as a question of fact that the infant plaintiff was not an employee as defined by the Workmen's Compensation Law, but was working and injured in defendant's restaurant in violation of the Child Labor Law.

In *Lengyel* v. *Bohrer,* 352 Pa. 531 (1953), 94 A. 2d 753:

> "In November 1950, George J. C. Lengyel, then 14 years of age, was employed by Marvin Bohrer as office

> boy for Marvin Bohrer, Inc., a corporation operating a lumber and millwork plant. In the beginning he was not required to work with or about any power machinery but in February, 1951, Bohrer assigned him duties which required him to work in the mill at a power-driven cut-off saw. On April 22, 1951, he started to work at the plant at 8 a.m. and continued all day until about 11 p.m. when his left hand became entangled in the saw, as a result of which he sustained very severe injuries."

Thus in *Lengyel* v. *Bohrer,* supra, relied upon by the defendant, there was no issue that the infant plaintiff was an employee and regularly employed at the defendant's place of business, and no argument made that there was a violation of the Child Labor Law solely on the basis that the infant plaintiff was "permitted to work".

In *Fritsch* v. *Pennsylvania Golf Club,* 355 Pa. 384, 50 A. 2d 207 (1947), the infant plaintiff was regularly employed by the defendant to care for the greens at the defendant's golf club. In the course of his employment of taking care of the greens, the infant plaintiff while riding in defendant's tractor was thrown off and seriously and permanently injured.

Again, in *Fritsch,* supra, the issue that the infant plaintiff was not an employee was never raised, nor the issue raised on this appeal discussed by the Court therein.

The above distinctions between *Lengyel* v. *Bohrer,* supra, and *Fritsch* v. *Pennsylvania Golf Club,* supra, and the case at bar also apply to the other cases cited by the defendant in Point I of his brief.

In *Evans* v. *Allentown Portland Cement Co.,* 433 Pa. 595 (1969), cited by the defendant, the Court stated that:

> "The minor is thus treated just *like the adult,* with the exception of the additional amount recoverable.

> With regard to adults, we have often held, most recently in *Hyzy* v. *Pittsburgh Coal Co.*, 384 Pa. 316, 121 A.2d 85 (1956), that even where neglect of a statutory duty is alleged, the *employee's* only remedy is under the Workmen's Compensation Act." (emphasis supplied)

In addition to the reference to employee (the jury in the case at bar found as a question of fact that the infant plaintiff was not an employee) the Court in *Evans* makes the observation that a minor is to be treated like an adult. Under the Pennsylvania Workmen's Compensation Law, when an adult is not an employee the Workmen's Compensation Law does not apply. *Rodgers* v. *P.G. Publishing Co.*, 194 Pa. Super. 207, 166 A. 2d 544 (1960).

Finally, the defendant cites an appeal from the Workmen's Compensation Appeals Board, which had reversed a Referee's award of benefits to an infant plaintiff. The Referee's findings were that the infant plaintiff ". . . at the end of June began to work *regularly* to July 11, 1972, for the defendant", among other findings. *Workmen's Compensation Appeal Board* v. *Piccolino*, 341 A. 2d, 922 (Comm. Ct. Pa. 1975). (Emphasis supplied)

The Court, in *Workmen's Compensation Appeal Board* v. *Piccolino*, supra, held that ". . . the record contains ample evidence to support all of the Referee's findings of fact. The Referee chose to believe claimant's evidence and the Board and this Court are bound by his findings."

In the case at bar, the jury found that the infant plaintiff was not an employee as defined by the Pennsylvania Workmen's Compensation Law, but was working in violation of the Child Labor Law and those findings of fact should be binding on the Trial Court who refused to set aside the jury verdict and the Court herein.

With respect to the issues raised in Point 3 of defendant's brief, there is nothing illogical in holding that one not an employee should not be bound by the Pennsylvania

Workmen's Compensation Law, nor does such a holding deny defendant herein the equal protection of the laws and violate Amendment XIV of the Constitution of the United States.

CONCLUSION

The judgment appealed from should be affirmed on both the law and the fact.

Dated: September 30, 1976. Respectfully submitted,

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